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December 29, 2003

VIA HAND DELIVERY

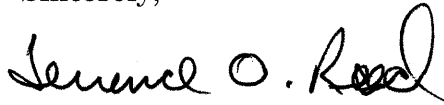
Deborah Tate, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37219

Re: Petition of Chattanooga Gas Company, Nashville Gas Company, a  
division of Piedmont Natural Gas Company, Inc. and Atmos  
Energy Corporation for a Declaratory Ruling regarding the  
Collectibility of the Gas Cost Portion of Uncollectable Accounts  
under the Purchase Gas Adjustment ("PGA") Rules  
Docket No. 03-00209

Dear Chairman Tate:

Enclosed are the original and thirteen (13) copies of Petitioners' Reply to CAPD's  
Response to Petitioners' Motion to Strike.

Sincerely,



Terrence O. Reed

TOR/nmg

Enclosures

WALLER LANSDEN DORTCH & DAVIS

A PROFESSIONAL LIMITED LIABILITY COMPANY

Deborah Tate, Chairman

December 29, 2003

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cc: Shilina Chatterjee, Esq.  
Archie Hickerson  
Bill Morris  
Jerry W. Amos, Esq.  
James Jeffries, Esq.  
Patricia Childers  
Joe A. Conner, Esq.

IN RE:

PETITION OF CHATTANOOGA GAS  
COMPANY, NASHVILLE GAS COMPANY,  
A DIVISION OF PIEDMONT NATURAL  
GAS COMPANY, INC. AND UNITED  
CITIES GAS COMPANY, A DIVISION  
OF ATMOS ENERGY CORPORATION,  
FOR A DECLARATORY RULING  
REGARDING THE COLLECTIBILITY  
OF THE GAS COSTS PORTION OF  
UNCOLLECTIBLE ACCOUNTS UNDER  
THE PURCHASED GAS ADJUSTMENT  
("PGA") RULES

## Petitioners' Reply to CAPD's Response to Petitioners' Motion to Strike

This Reply addresses the dispute over certain assertions of fact contained in the previously filed affidavit of Daniel W. McCormac in this proceeding. The fundamental position of the Petitioners (and the Authority) with respect to Mr. McCormac's affidavit remains unchanged by the CAPD's Response. The Petitioners continue to contend that Mr. McCormac's assertions of fact set forth in his affidavit are immaterial, unsubstantiated and disputed. As a consequence, and on the pending cross-motions for summary judgment, the Authority must either find that these disputed facts are immaterial to the discrete legal

question presented for decision in this docket, in which case summary judgment is appropriate, or if it finds that these disputed facts are material to the legal issue before it, then the Authority must conduct a full evidentiary hearing in order to resolve the dispute.<sup>1</sup> No other result is legally sustainable. In this case, the Petitioners contend that the former approach is most proper and that the Authority should proceed to decide the legal issues presented on summary judgment without consideration of the factual assertions contained in Mr. McCormac's affidavit.

In its Response, the CAPD makes two arguments. First, it contends that there is no "substantiation" requirement under Tennessee law for facts asserted in Mr. McCormac's affidavit. Second, the CAPD argues that Mr. McCormac's affidavit was based on documents in the record. Petitioners do not agree with either contention.

Without revisiting the argument over the appropriate legal standard for Summary Judgment as a whole, which has been fully addressed in prior pleadings and at oral argument in this docket, it is generally true that witnesses who submit affidavits in support of or opposing motions for summary judgment have a legal obligation to make those affidavits upon their own personal knowledge.<sup>2</sup> Similarly, parties such as Petitioners in this docket have the right to seek discovery of the basis of that personal knowledge.<sup>3</sup> If, upon examination, factual assertions turn out not to be based upon first-hand knowledge of the witness, then they are not entitled to any evidentiary weight.<sup>4</sup> This is as true for sworn affidavits as it is for direct testimony taken under oath. As such, and contrary to the CAPD's assertions, there is an underlying evidentiary requirement under Tennessee law

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<sup>1</sup> See T.R.C.P. 56.03.

<sup>2</sup> See T.R.C.P. 56.06.

<sup>3</sup> See T.R.C.P. 26.02.

<sup>4</sup> See T.R.E. 602.

that assertions of fact offered as evidence in the context of a motion for summary judgment be substantiated.

In this case, various assertions by Mr. McCormac in his affidavit are disputed by the Petitioners. In an effort to try to determine the basis for these disputed assertions, the Petitioners, through United Cities Gas Company, sought discovery of the CAPD regarding these matters. These efforts were largely unfruitful as Petitioners' were referred generally to "documents in the record" in this proceeding (including Petitioners' own affidavits) or to Mr. McCormac's general recollections without reference to specific documents, conversations or events. These references did not provide Petitioners with a reasonable explanation of the basis of Mr. McCormac's assertions or a reasonable opportunity to test the credibility of the assertions. In its recent Response, for the first time, the CAPD has produced some explanation of the basis for some of Mr. McCormac's assertions, although the explanations remain non-specific and general in most instances.

The fact that the basis for Mr. McCormac's assertions is now somewhat clearer than it was at the time Petitioners filed their Motion to Strike, however, does not cure the underlying difficulty of these assertions for purposes of the pending cross-motions for summary judgment because they continue to be disputed and are otherwise immaterial to the discrete legal issues presented for decision. The disputed nature of these assertions is apparent from the affidavits of Mr. Hickerson and Ms. Childers presented with Petitioners' Motion to Strike which directly contradict many of Mr. McCormac's assertions. Petitioners' contention that Mr. McCormac's assertions are immaterial is based on the fact that these assertions do not go to the Authority's determination as to whether or not the gas costs portion of uncollectible accounts may be properly recovered through the Authority's Purchased Gas Adjustment rules and procedures. As such, they lack any evidentiary weight and may be ignored for purposes of summary judgment.

In the context of the pending cross-motions for summary judgment, the Authority can reach two possible determinations with respect to the assertions contained in Mr. McCormac's affidavit. If it concludes that Mr. McCormac's disputed assertions of fact are immaterial to the legal issues presented to the Authority for decision, as Petitioners contend, then it would be appropriate to strike and/or ignore those assertions and decide the legal issues presented on the parties' cross-motions for summary judgment. If the Authority concludes that Mr. McCormac's assertions are material to the legal issues presented on summary judgment, which Petitioners contend they are not, then the disputed nature of those assertions requires an evidentiary hearing. In the Petitioners' view, a cursory review of Mr. McCormac's affidavit leads quickly to the conclusion that the facts alleged therein are not material to the discrete legal questions presented to the Authority for decision in this case. Accordingly, the Authority should grant Petitioners' Motion to Strike and/or ignore Mr. McCormac's affidavit for purposes of deciding the pending Motions for Summary Judgment.

Respectfully submitted this 29<sup>th</sup> day of December 2003.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed,  
postage prepaid to the following this 29<sup>th</sup> day of December, 2003.

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